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Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 79.

LEHIGH VALLEY COOPERATIVE FARMS, INC., AND SUNCREST FARMS, INC.,

v.

UNITED STATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE STATES OF VERMONT AND CONNECTICUT, AMICI CURIAE.

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BRIEF FOR THE STATES OF VERMONT AND CONNECTICUT, AMICI CURIAE.

This brief on behalf of the States of Vermont and Connecticut is being filed pursuant to the provisions of Rule 42, paragraph 4, in support of the position of the respondents.

Opinions Below.

The opinion of the United States Court of Appeals is reported in 287 F. 2d 726; the opinion of the District Court is reported in 183 F. Supp. 80.

The decision of the Judicial Officer of the United States Department of Agriculture, case of *In re Lehigh Valley Cooperative Farms, Inc.*, is reported at 18 Agr. Dec. 75, and the case of *In re Suncrest Farms, Inc.*, is reported at 18 Agr. Dec. 191.

Statute and Order.

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. § 601 *et seq.*), which re-enacted with amendments the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended. The declared policy of the Act is to establish and maintain such orderly marketing conditions for milk and certain other agricultural commodities as will establish prices to farmers which are parity prices as defined in the Act. Whenever the prices thus determined for a marketing area are unreasonable with respect to milk in view of the various economic factors which affect market supply and demand for milk and its products in the marketing area, the Act directs the fixing of such prices as will reflect these economic factors, insure a sufficient supply of pure and wholesome milk, and be in the public interest (7 U.S.C. § 608c (18)).

The Act provides for regional milk orders (7 U.S.C. § 608c (11)). The Act provides the procedure and conditions incident to the issuance of an order or an amendment to an order. The provisions which a milk order may contain are set forth in section 608c (5), 608c (7) and 610 (b) (2) (i). In addition to the statutory authority in section 8c (5) of the Act for classification, pooling and pricing of milk, auxiliary provisions may be included in an order (§ 608c (7) (D)) of the Act where such provisions are incidental to and not inconsistent with the terms and provisions specifically provided in subsections (5) and (7) of the Act and necessary to effectuate the other provisions of an order. The relevant provisions of the Act are set forth below:

Section 8c (5) of said Act, captioned "Milk and its products; terms and conditions of orders," provides in pertinent part as follows:

"In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

"(B) Providing:

. . . . . .

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered . . ."

Section 608c (7) of the Act provides:

"In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

. . . . . .

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)—(7)

of this section and necessary to effectuate the other provisions of such order."

The order involved is milk marketing Order No. 27, as amended (7 C.F.R. 927.1 *et seq.*), with particular reference to section 927.83, said section being the compensatory payment provision of said Order No. 27.

Question Presented.

The Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 as amended has issued an order regulating the handling of milk in the New York–New Jersey milk marketing area, order No. 27 (7 C.F.R. 927.1 *et seq.*). The question is whether the Secretary has statutory authority to provide in his order that an out of market handler who under the order is not subject to full regulation must pay a "compensatory payment" on limited sales made in the marketing area to offset the loss occasioned in the fluid milk sales of the producers regularly supplying the market and so recognized in the order, and, further, whether the appropriate measure of the rate of the "compensatory payment" is the difference between the fluid (class I A) and manufactured (class III) milk prices under the order inasmuch as the displacement forces the regular producer's milk out of the higher class I A into the lower class III price category.

Statement of Interest.

Milk producers in the State of Vermont market their milk in several markets which are regulated by federal

milk marketing orders containing "compensatory payment" provisions comparable to those in issue in the instant case.

A number of these milk producers market their milk in the New York–New Jersey marketing area under the provisions of order No. 27 (7 C.F.R. 927.1 *et seq.*), here in issue. Others market their milk in the Greater Boston milk marketing area under the provisions of order No. 4 (7 C.F.R. 904.1 *et seq.*); Springfield marketing area order No. 36 (7 C.F.R. 996.1 *et seq.*);[1] Worcester marketing area order No. 99 (7 C.F.R. 999.1 *et seq.*); Southeastern New England marketing area order No. 90 (7 C.F.R. 990.1 *et seq.*); and Connecticut marketing area order No. 119 (7 C.F.R. 1019.1 *et seq.*).

According to "Milk—Farm Production, Disposition, and Income," issued by the Crop Reporting Board of the Agricultural Marketing Service of the United States Department of Agriculture for the period 1959-1960, the total quantity of milk sold by milk producers in Vermont to plants and dealers in 1960 was 1,830,000,000 pounds, having a cash value of $90,951,000. The number of cows on farms in 1960 in Vermont was 258,000. The production and marketing of milk in the State of Vermont is a very substantial industry, one of the most important in the State.

Milk producers in the State of Connecticut market their milk in several markets which are regulated by federal milk marketing orders containing "compensatory payment" provisions.

The greater part of their milk is marketed in the Connecticut marketing area under order No. 119 (7 C.F.R. 1019.1 *et seq.*): see section 1019.46 for "compensatory payment" provisions.

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[1] The "compensatory payment" provisions of the Springfield, Massachusetts, milk order are involved in the case of *Knudsen Bros. Dairy, Inc.*, v. *Benson*, presently awaiting decision in the United States Court of Appeals for the Second Circuit.

They also market milk in the New York–New Jersey marketing area under the provisions of order No. 27, the "compensatory payment" provisions of which are in issue in this proceeding, and in the Springfield, Massachusetts, marketing area under the provisions of order No. 96 (7 C.F.R. 996.1 *et seq.*), and the southeastern New England marketing area under the provisions of order No. 90 (7 C.F.R. 990.1 *et seq.*), both of which latter orders have "compensatory payment" provisions similar to those involved in the instant proceedings.

During the year 1960 the total quantity of milk sold by milk producers in Connecticut to plants and dealers was 665,000,000 pounds, for which the milk producers received $38,404,000. The number of cows on farms in Connecticut in 1960 was 89,000.[2]

Statement.

The statement of the case set forth in the brief filed on behalf of the respondents is adopted for the purposes of this brief. It is the purpose of the proponents of this brief to limit the discussion and argument to the question of whether the "compensatory payment" provisions of order No. 27 as amended, issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 as amended, are authorized by the Act and valid and therefore binding upon the petitioners.

This brief is submitted by and on behalf of the States of Vermont and Connecticut in support of the position of the respondents.

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[2] "MILK—Farm Production, Disposition and Income, 1959-1960," published by the Crop Reporting Board of the Agricultural Marketing Service of the United States Department of Agriculture.

Argument.

I. The Provisions for Compensatory Payment in the Order are Not Inconsistent with the Requirements of Section 608c (5) (A) of the Act.

Order No. 27, here involved, was designed to meet the difficult and complicated production and marketing conditions peculiar to the New York–New Jersey marketing area pursuant to the provisions of section 608c (11) (C) of the Act. Section 608c (5) of the Act sets forth the terms and conditions which may be contained in an order issued by the Secretary of Agriculture regulating the marketing of milk. The principal provisions, insofar as they are applicable to the order in this proceeding, pertain to the classification, minimum pricing and pooling of producer milk.

The order provides for a marketwide pool and marketwide equalization of producer returns (7 C.F.R. 927.65-927.82). The producer received a uniform or blended price based upon the total value of all milk used by all handlers who receive milk from "producers" under the order. The method employed in the computation of the uniform blended price is set forth in *Grant* v. *Benson*, 229 F. 2d 765, 767 (C.A. D.C.), cert. den. 350 U.S. 1015, as follows:

> "The market administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the minimum class price set forth in the order and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. ***** The result is divided by the total quantity of milk that is priced under the Regulatory Program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk.

"Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price, is required to pay the differen e into an equalization or producers' settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producers' settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer settlement fund."

Wide discretion is vested in the Secretary to provide, on the evidence adduced at the public hearing, regulatory provisions that are necessary in order to attain the legislative goal. The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy and the policy are peculiarly matters for administrative competence. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 613-614.

It has been necessary in numerous instances to define producers as distinguished from dairy farmers who are not producers and to regulate in different ways the milk from the two groups. Such differences and distinctions are necessary in order to define and determine thereafter milk to be included in the computation of the blended price and the milk subject to full regulation. Latitude is conferred by the Act to include or exclude milk in the operation of the equalization pool. *Green Valley Creamery* v. *United States*, 108 F. 2d 342, 345.

It has also been held that the classification, pricing and pooling provisions in section 8c (5) (A) and section 8c (5) (B) of the Act are to be given a practical regulatory significance in relation to handlers and processors, and the

effect of their mode of doing business upon the marketing problem, and milk from outside a regular source of supply, that is, fully regulated by an order, may be regulated in a different way by the order. *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 92-94, cert. den. 329 U.S. 788.

The petitioners in this case are non-pool handlers. The order imposes no obligation or requirement on non-pool handlers with respect to the payment of a minimum price for the milk received from "dairy farmers" at "non-pool plants." There is no violation of section 608c (5) (A) of the Act for the payment of a uniform price for milk purchased from producers or associations of producers. They are free to negotiate with the farmer supplying them with milk as they see fit. The petitioners present no issue under section 8c (5) (B) (ii). If this section of the Act were applicable to petitioners, they would be subject to full instead of partial regulation.

In order to accomplish the computations which must be made to determine the uniform blended price it is necessary to ascertain the milk to be included in the computation. The order, therefore, sets forth definitions.

As defined in the order a "producer" means any dairy farmer where milk is delivered from his farm to a "pool plant," with certain exceptions not here material (7 C.F.R. 927.6).

The term "dairy farmer" is defined in the order as any person who produces milk (7 C.F.R. 927.5), but the minimum price provisions of the order are by these terms not applicable with respect to the milk of "dairy farmers." It is only with respect to the milk of "producers" as thus defined that the handler is required to account to the pool at the minimum price established by the order. There is no requirement in the order that the handler pay a minimum price for milk received from "dairy farmers" who are not "producers."

The order distinguishes between (1) a handler of milk received from "producers" at a "pool plant" and (2) a handler of milk received from "dairy farmers" at a "non-pool plant." The handler is free to make any settlement which he may elect to make with the dairy farmers for the milk received from them at "non-pool plants."

II. Section 608c (7) (D) Vests in the Secretary of Agriculture the Authority to Prescribe the Compensatory Payment Provisions of the Federal Order.

The Act provides in section 608c (7) (D) that a milk market order shall include terms and conditions "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)—(7) of this section and necessary to effectuate the other provisions of such order."

One of the difficult problems which confronts the Secretary in determining the extent of any regulation which he will issue, and the terms and provisions thereof, pertains to the application of the regulation to those handlers who distribute a small percentage of their milk in the regulated market area and to the handler who only occasionally sells a portion of his milk in the regulated market. This problem has confronted the Secretary in practically every market where a milk regulation order has been issued and made applicable by the Secretary.

The regulation which governs the marketing of milk in a designated marketing area must be clear and specific in order to delineate with particularity the area and the milk subject to the regulation. The order is made applicable to a particular marketing area. Not only must the area be defined and, as changing conditions require, redefined, but the standards to define the plants which regularly supply the milk to the marketing area must be set forth with particularity. Thus the terms "pool plant," "pool milk,"

"producer" and "outside milk" have been used in the order to provide particularity of the order application to certain milk which is to be fully priced and regulated. This is necessary so that the full impact of the regulation which is suited to the particular problems of the specific marketing area to be regulated will be applied to milk reasonably identifiable within the marketing area to be regulated and not to milk principally associated in some other marketing area with different marketing problems.

These plants, which in the main regularly supply milk to the marketing area, are designated "pool plants" where milk is received from "producers." Whenever the boundary lines of the marketing area are drawn there would always be some fringe sales, either by regulated handlers to customers outside the designated marketing area or by handlers whose principal business is outside the area to customers within the marketing area as defined. Thus the matter of "peripheral sales" and the matter of dealing therewith in relation to the order were presented.

Since 1945 the Secretary has included in marketing orders issued by him regulating the marketing of milk provisions substantially the same as the compensatory payment provisions of order No. 27 here in issue.

When order No. 27 was originally issued, effective September 1, 1938, it contained a provision pertaining to "unpriced milk." This provision was challenged in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533. The majority of the Court upheld this provision although it clearly pointed out that certain milk was fully regulated while the "unpriced milk" was only partially regulated. After public hearing in 1940 order No. 27 was amended so that all milk received at a plant approved by any health authority as a source of milk for the marketing area would be pooled and so priced that handlers would not have an advantage created by the order to disrupt the orderly market-

ing of producer milk. This provision was sustained in *Titusville Dairy Products Co.* v. *Brannan* (C.A. 3, 1949), 176 F. 2d 332, cert. den. 338 U.S. 905. In that case the authority to extend milk regulation to all receipts of milk by a handler, even though no milk was disposed of in the regulated marketing area, was sustained when the milk was eligible for disposition under health regulations.

Following hearings, and as a result of the experience, the order was again amended in 1945 to provide a pool plant system. Under this system milk delivered to a plant which shipped, or which had the ability and willingness to ship, fluid milk into the marketing area was fully regulated under the provisions of the order. These plants were designated as "pool plants" and the milk was designated as "pool milk." Under this program milk from "non-pool plants" was permitted to be sold in the marketing area under the condition that a "compensatory payment" be made with respect to it (7 C.F.R. 1945 Sup. 927.8 (e), 927.9 (h)). This provision was held invalid in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), cert. den. 344 U.S. 891.

Discussion with respect to the *Kass* case and differentiation between the present case and the *Kass* case will be made later in this brief on page 22.

Following decision in the *Kass* case and as a result of extended hearings in 1953, extensive findings and conclusions were made by the Secretary and new "compensatory payment" provisions were promulgated (18 F.R. 8444 *et seq.*). On the basis of evidence adduced at the hearing on the 1953 amendments the Secretary found that—

> "When provision is made for marketwide equalization of payments to producers it is essential that the benefits of such equalization accrue only to those farmers who are engaged in the production of a supply of milk which is primarily produced for and always

available for use when needed in the marketing area. Otherwise, the money paid by consumers for fluid milk would in part be distributed among farmers delivering milk to plants which do not constitute a part of the regular and dependable supply of milk for the market. Such distribution of the returns from the sale of milk in the marketing area would not be in the best interest of either consumers or producers since the money which is intended to provide producers with an incentive to produce an adequate and dependable supply of pure and wholesome milk for the marketing area would be dissipated through distribution to farmers only incidentally engaged in the business of supplying marketing area with milk." 18 F.R. 8444, 8447.

Further, it was found that—

"Non-pool milk which originates at a plant not subject to a market-wide equalization pooling plan has a substantial advantage over pool milk in addition to the price advantage. The handler who receives pool milk from producers and uses or sells it for Class I-A purposes is charged the Class I-A price but is not permitted to pay that full price to his own producers. Instead he must pay a substantial part of it into the equalization fund [*i.e.* producer-settlement fund] under the order for distribution through the pool to all pool producers. A non-pool plant operator is not so burdened and limited for he can pay his own farmers the full Class I-A price or any part of it as he believes necessary to retain his supply of milk or outbid pool plant competitors for milk. Unless this condition is dealt with, the non-pool dealer can always outbid a similarly located pool plant competitor for milk sup-

plies without cost to himself. The pool plant competitor obviously cannot afford to pay his own producers the full Class I-A price and also pay equalization to the pool on the same milk. . . .

"It is concluded that provisions in the order for imposing such a charge (compensation payments) on nonpool milk are not only incidental to the provisions establishing class prices and market-wide equalization but are necessary to effectuate such provisions, and are not inconsistent with the terms and conditions specified in Section 8c (5) and 8c (7) of the Act. It is further concluded that the rates of payment herein specified are those which are necessary and appropriate to accomplish the purpose indicated." 18 F.R. 8444, 8445, 8446, 8448.

In 1957 extended hearings were held on the amending of order No. 27 to consider extending the marketing area to Northern New Jersey and upper New York State. As a result of such hearings, and based upon evidence therein, amendments to the order were issued effective as of August 1, 1957 (22 F.R. 4643). The order as amended continued in effect the requirements for compensatory payments. The provisions, findings and conclusions were in all respects retained in the issuance of the 1957 amended order (22 F.R. 4221-4222). These provisions of the 1957 amended order for compensatory payments are involved in this litigation, and the relevant sections of the 1957 amended order are part of the record (R. 879(a), 884(a)).

The Secretary made extensive findings on the basis of the hearings on the 1957 amendments (22 F.R. 4194, 4207-4208). In essence he found that compensatory payments were designed to bring substantial equity between the handler and the producer of pool milk and the handler and

producer of non-pool milk with respect to sales in the marketing area.

The compensatory payment provisions of the order are necessary to insure against displacement of pool milk by milk which is not accounted for to the equalization fund. When the non-pool handler sells fluid milk in the marketing area in times of surplus, he displaces an equal quantity of pool milk which would have been accounted for to the equalization fund at the class I fluid price. As a result of the displacement, the pool milk is sold as surplus milk and is accounted for in the equalization fund at the class III manufacturing price. Absent the compensatory payment provisions of the order, the pool producers will stand to lose because of a reduction in the uniform blended price and the non-pool handler stands to gain because he is not accountable to the equalization fund for any of his milk and may retain the difference between the class I and the class III price. The difference will either add to the non-pool handler's profit or it may be used by him in the procurement of milk from pool producers at the expense of pool handlers. The compensatory payments are thus essential to preserve uniformity of pricing under the classified pricing program of the order and the integrity of the equalization fund. If intermittent supplies or peripheral supplies are not to be subjected to the full regulation of the order, there is no choice as to what type of provision can be used for this purpose, since minimum class prices may not be set under the order for handlers who do not participate in the marketwide equalization.

The Sub-Committee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Congress, First Session, held hearings in connection with and study of the dairy industry after decision in the *Kass* case. At that time there were a number of milk orders issued by the Secretary of Agriculture under the authority granted

him by the Agricultural Marketing Act which contained a compensatory payment provision. A number of milk orders which contained such provisions came to the attention of the sub-committee in the course of the hearings. No legislative action was suggested or proposed to prohibit or discourage the use of provisions for compensatory payment as a result of these hearings. The administrative practice of utilizing compensatory payments in milk orders had long been continued.

It is respectfully submitted that, if the Congress had been adverse to the administrative regulation, it had reasonable opportunity to take action to rescind or repeal such legislation, or to enact legislation to prevent the use of such provisions in milk orders. It is submitted that this failure on the part of Congress to act is some evidence of Congress's approval of the administrative interpretation and entitled to great weight. *Leycock* v. *Kenney*, 270 F. 2d 580, 587-589 (C.A. 9, 1959). *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956).

The Secretary is given broad discretion in administering the order program under the Agricultural Marketing Agreement Act of 1937. *Queensboro Farm Products* v. *Wickard*, 137 F. 2d 169. The terms of the orders issued pursuant to the Act are largely matters of administrative discretion, and technical details of the milk business are left to the Secretary and his aides. *Stark* v. *Wickard*, 321 U.S. 288, 310.

The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy and the policy are peculiarly matters of administrative discretion. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 613-614.

Recognizing that varying conditions in different markets may require different approaches to a similar problem, the

St. Louis market, in its approach to the compensatory payment problem, adopted a provision providing for allocation. This approach, and the provision in that order, were approved in *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87 (8th Cir.), cert. den. 329 U.S. 788 (1946):

> "It is to be borne in mind that the classification requirement in 7 U. S. C. A. Section 608c (5) (A) has reference to producers' milk, so that the question under this provision is merely whether the allocation formula compels a handler to pay for producers' milk . . ." (P. 94.)
>
> "The handlers insist that proration is the only proper and just method of allocation, but they, of course, are looking at their own position as much as that of producers, while the statute looks primarily at that of producers." (P. 94.)
>
> "The Supreme Court has refused to read other language in 7 U. S. C. A. Section 608c (5) (A) in a literal significance which would defeat the regulatory purpose of the Act, when it held in United States v. Rock Royal Co-Operative, 307 U. S. 533, 578-580, 59 S. Ct. 993, 1016, 83 L. Ed. 1446, that an 'agency' cooperative was subject to the Agricultural Marketing Agreement Act, even though it had not technically 'purchased' the milk of its producers . . ." (P. 95.)
>
> "And, finally, in hospitable approach to the question of statutory construction, it should be observed that if allocation of highest-class utilization to producers' milk as against outside milk is not permissible as a use classification for price purposes under 7 U. S. C. A. Section 608c (5) (A) then a handler could by segregation and use of his outside milk in Class I completely frustrate the regulatory purpose of the statute." (Page 95.)

The District Court in its opinion in this case states:

> "By a plan of full regulation of those who regularly supply the Order No. 27 (i.e., the New York–New Jersey Milk Marketing Order) area, based upon a market-wide pool, the Secretary has distributed the burden of surplus milk and its resulting decreased return in the form of milk products, upon all of the fully regulated handlers and their suppliers. So long as there is a reasonably high percentage of fluid milk sales and a corresponding reasonably low percentage of nonfluid sales (whatever those relative proportions might be for a healthy market) the return to the farmers will be adequate. Sales of fluid milk in the area by nonregulated handlers posed a fundamental threat to this adequate amount of return. If unchecked, they could seriously disrupt the whole regulatory plan. The Compensatory Payment provisions (which provisions appear in varying form in almost all of the government's milk regulating orders) are calculated to check or greatly minimize this threat. Thus they are calculated to carry into effect Order No. 27 and are authorized by the Act as 'incidental' and 'necessary' to carry out its terms, 608c (7) (D)." (183 F. Supp. 80, 90-91.)

The District Court ruled that the compensatory payment provisions of order No. 27 were inconsistent with the uniform price provisions of the Act and accordingly were invalid. Reaching this conclusion that Court relied on *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), cert. den. 344 U.S. 891.

On review the Court of Appeals reversed the judgment of the District Court and found that the compensatory payment provisions of order No. 27 are valid and not inconsistent with section 608c (5) (A) of the Act.

"Section 8c (5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, this accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U. S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F. Supp. 66, 73 (N. D. Ohio 1960).

"Moreover to imply the thought urged by Lehigh and Sunerest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the express purpose set forth in the Act itself, i.e., regional regulations to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the Kass case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

"It is evident that in all three illustrations, employment of the Kass theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Sunerest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.

"We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Sunerest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: 'Such price shall be uniform as to all handlers,' guarantees them a cost equal to that of pool handlers. But there is not the slightest indication that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan." *United States* v. *Lehigh Valley Co-operative Farmers, Inc.*, 287 F. 2d 726.

Similar compensatory payment provisions were considered in *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio, 1960), on appeal to the United States Court of Appeals for the Sixth Circuit. In upholding the validity of the compensatory payment provisions of the Cleveland

milk order under circumstances similar to those present here, the District Court held (72-73):

> "Fluid milk sold in the regulated area by non-pool handlers displaces fluid milk sales that otherwise would have been made by pool handlers, causing the latter to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to the producers. The prospect of such results constituted a real threat to the integrity of the basic regulatory plan. At the outset of the promulgation hearing it was considered that all handlers who sold any milk in the Cleveland area should be fully regulated. The proposed order that accompanied the notice of the promulgation hearing so provided. Full regulation under similar circumstances has received judicial approval, Titusville Dairy Products Co. v. Brannan, 3rd Circuit, 176 F. 2d 332 Cf. United States v. Rock Royal Cooperative, Inc. supra. At the hearings, however, it was shown that full regulation of such non-pool handlers would subject them to an unwarranted burden of payments and assessments and place them at a severe competitive disadvantage with other non-pool handlers in the sale of milk in non-regulated areas. Accordingly, it was determined that the alternative of partial regulation of non-pool handlers who distributed 10% or less of their milk in the regulated area would subserve the purpose of protecting the basic plan of regulation and be equitable to such non-pool handlers. Such alternative was incorporated in Section 975.72 (A) of Order No. 75. The provisions of this section of the Order are not inconsistent with subsections (5)-(7) of 608c of the Act and being designed to preserve the integrity of the basic plan they must be regarded as incidental and necessary 'to effectuate the other provisions of the

> Order'. It should be noted that in Kass v. Brannan the alternative of full regulation was not present. Kass purchased milk products from another handler. He made no purchases of milk from farmers who could have been brought within the ambit of full regulation under Order 27 as producers."

It is not the purpose of compensatory payments to equalize the cost between handlers who are fully regulated under the order and those handlers who are only partially regulated. In fact, there is no authority under the Act to equalize such costs even between handlers who are fully regulated. The authority of the Secretary under section 608c (5) (A) is to establish minimum prices for the various classes of milk in the pool on the basis of which fully regulated handlers must account to the equalization fund. As previously pointed out, a handler does not pay the producer on the basis of minimum prices established pursuant to section 608c (5) (A), but rather on the basis of the uniform blended price under section 608c (5) (B).

Partially regulated handlers such as the petitioners are not subject to the minimum pricing provisions of the order, nor are they required to pay the uniform blended price to their producers. The amount a partially regulated handler pays for his non-pool milk is entirely a matter of negotiation between him and the farmers supplying such milk. Since handlers' costs are not in any way subject to regulation under the order, it follows that compensatory payments are in no way related to such costs.

III. The Case of Kass v. Brannan, 196 F. 2d 791, Cert. Den. 344 U.S. 891, is Not Controlling.

The factual situation in the *Kass* case is markedly different from the situation in the instant case. The conclusions

reached by the majority of the Court in the *Kass* case, based upon its individual facts, are not controlling and are distinguishable from the situation in the instant case. The disputed charge in the *Kass* case was made on cream and condensed milk purchased by a distributor within the New York marketing area from a non-pool plant in Ohio. The Ohio plant was not approved by any marketing area health authority as a source for fluid milk or fluid cream for the marketing area. If the cream and condensed milk moved directly from the Ohio plant to the consumers, or if the Kass plant had not been located at the marketing area, it would not have been subject to the provisions of the order. The Kass plant at that time received no milk from producers.

In the instant case the disputed charge is made on fluid milk received by the petitioners from dairy farmers and sold directly by the petitioners to the consumers in the marketing area. In deciding the *Kass* case the Court attempted to compare the price paid, or probably paid, by the marketing area distributor (Kass) for cream and condensed milk to the operator in the interhandler sale with the minimum class prices at which a handler must account for raw milk as fixed by the order pursuant to section 8c (5) (A) of the Act.

On the basis of this comparison the Court concluded that the rate of such compensatory payment was not a proper rate, and therefore was not in accordance with law. The Court did not appreciate that section 8c (5) of the Act applies only to milk received by a handler from producers or associations of producers. *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87, 94.

In the *Kass* case the Court did not say that a compensatory payment provision was unlawful *per se*, or that any charge on non-pool milk is unlawful. The entire basis for holding the payment unlawful was the lack of evidence in the record to support the rate on cream and condensed

milk moving from a non-pool plant in Ohio to a plant within the marketing area.

In the instant case the evidence in the administrative hearings amply supports the findings of the Secretary with respect to the necessity for and the rate of the compensatory payments provided in the order (R. 752a-755a; 22 F.R. 4194, 4207-4208). The sole ground upon which the District Court ruled against the validity of the contested provisions of the order was that such provisions were in conflict with section 8c (5) (A). This conclusion was reached by the District Court in reliance on the *Kass* case, 183 F. Supp. 80. The opinion of the Court in the *Kass* case seems to rest upon the principle that the purpose of the compensatory payment is the equalization of costs between regulated and non-regulated handlers. We respectfully submit that section 8c (5) (A) of the Act makes no reference to equalization of handlers' costs. It provides simply for uniform minimum class prices for which the pool handlers must account to the Producer Settlement Fund. This was recognized by the Court of Appeals in the instant case, which rejected the reasoning of the *Kass* case in its opinion sustaining the validity of the compensatory payment provisions of the order here in issue.

Section 8c (5) (A) of the Act does not prevent a handler from paying a premium to producers for milk over and above the uniform blended price. His accountability, however, to the Producer Settlement Fund is measured by the minimum prices fixed by the marketing order under section 8c (5) (A). *Stark* v. *Wickard*, 321 U.S. 288, 303. If a handler pays more than the minimum prices at his pool plant, and another handler does not, their costs of milk will be different. The handler who pays premiums to his own producers is not relieved of paying an equivalent amount to the pool. His pool contribution remains due as a matter of mandatory minimum pricing.

Neither fully regulated nor partially regulated handlers' initial costs are involved in the account and payment to the Equalization Fund.

Conclusion.

In view of the foregoing it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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